Supreme Court, U. S.
FILED
SEP 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-301

GEORGE W. LEWIS, et al.,

Petitioners,

vs.

WILLIAM F. HYLAND, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Respondents,
William F. Hyland, et al.,
State House Annex,
Trenton, New Jersey 08625

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel

ERMINIE L. CONLEY
Deputy Attorney General
On the Brief

N.J. Appellate Printing Co., Inc., South Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Counter-Statement of Issues Involved 1

Counter-Statement of the Case 3

ARGUMENT:

The Court should deny the Petition for Writ of Certiorari because the District Court and the Court of Appeals correctly concluded that Federal Equitable Relief is not warranted under 42 U.S.C. §1983 against the responsible state officials where the sole proof of alleged police misconduct consists, at the most, of 34 separate incidents occurring over a period of three years, the last of which occurred over five years ago at a time when the present responsible state officials were not yet in office, and where the Trial Court factually determined, and the Court of Appeals agreed, that there was no deliberate pattern and practice of unconstitutional police activity 6

Conclusion 13

CASES CITED:

Berenyi v. District Directors, Immigration and Naturalization Service,
385 U.S. 630 (1967) 7

Crane v. American Standard, Inc.,
490 F.2d 332 (2nd Cir. 1973) 11

Lewis v. Kugler,
466 F.2d 1343 (3rd Cir. 1971) 3

Rizzo v. Goode,
423 U.S. 362 (1976) 1, 3, 6, 10, 12

STATUTE CITED:

42 U.S.C. §1983 ..... 1,6, 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-301

GEORGE W. LEWIS, et al.,
Petitioners,

vs.

WILLIAM F. HYLAND, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNTER-STATEMENT OF ISSUES INVOLVED

1. Is broad equitable relief against the New Jersey State Police appropriate where, similar to the record in *Rizzo v. Goode*, 423 U.S. 362 (1976), the sole proof of 42 U.S.C. §1983 liability at the most consists of 34 separate incidents of illegal searches by individual State Troopers occurring over a three year period from April 1969 to February 1972 and where the responsible State officials against whom the injunctive relief is sought were not in office at the time of the alleged incidents and were not shown to be responsible in any way for the alleged misconduct?

2. Was the award of damages against three defendant troopers appropriate where, to the substantial prejudice of defendants, the issue of damages was raised for the first time approximately six years after the filing of the complaint and approximately three and a half years after the end of the trial?

COUNTER-STATEMENT OF THE CASE

This case involves an allegation by plaintiffs, that the New Jersey State Police conducted a pattern and practice of illegal searches and seizures of certain individuals traveling on the New Jersey highways over a period of time spanning three years, from 1969 to 1972, allegations similar to those made by plaintiffs against Philadelphia officials in this Court's recent decision of *Rizzo v. Goode*, 423 U.S. 362 (1976).

The complaint originally was filed in December 1970 seeking broad injunctive relief primarily against former Attorney General George F. Kugler, Jr., and former Superintendent of State Police, David B. Kelly, and several individual troopers.* After a hearing on plaintiffs' motion for preliminary injunction, the District Court denied the request and dismissed the complaint primarily on grounds of abstention. On appeal, the Court of Appeals for the Third Circuit found abstention inappropriate for those incidents which did not involve ongoing criminal proceedings and remanded for a trial. *Lewis v. Kugler*, 466 F.2d 1343 (3rd Cir. 1971).

The matter was tried on December 6, 7, 9, 10, 14, 15, 16, 20, 22, 1971; March 7, 8, 9, 1972; April 4, 1972; June 27, 1972. The heart of plaintiffs' case consisted of testimony by 60 witnesses of varying appearances, primarily "long-haired," concerning 66 incidents of alleged illegal searches conducted by New Jersey State Troopers over a

* The two principal defendants, Attorney General Kugler and Superintendent Kelly, have left public office. The present Attorney General, William F. Hyland, who took office in 1974, had no official dealings with or responsibility for the State Police during the period of time in which the alleged incidents occurred, the last of which was in February 1972. The present Superintendent of the State Police, Clinton Pagano, took office in 1975. While prior to his appointment as Superintendent he was a member of the supervisory staff of the State Police, there is no indication in the record that he ever exercised line supervision over the individual troopers found to have engaged in improper police conduct.

period of three years, from 1969 to 1972. The District Court determined that there were at least 1,500,000 police contacts with travelers in automobiles in New Jersey during the three years plaintiffs had alleged the illegal searches had occurred (Pet. App. p. 48a). Most importantly, the District Court found:

> "that there was no deliberate pattern and practice of violating Fourth and Fourteenth Amendment rights on the part of the Attorney General, the Superintendent, or State Police as a whole. Those instances of illegality were no more than willful and random acts on the part of a minority of Troopers.
>
> The responsible State officials have categorically denied that there was a pattern and practice. This testimony was entirely credible." (Pet. App. p. 48a).

With respect to the 34 incidents of illegal activity, only three involved named defendant troopers and named plaintiffs. Thus, the District Court concluded that "the nature of the present violation does not warrant large scale injunctive relief" (Pet. App. p. 50) and further concluded that it:

> ". . . did not find a 'substantial threat' of future violations on the part of those troopers who have been guilty in the past. The institution of suit and the passage of time and the consequent change of life styles and opinions have had a beneficial effect on the problem which is the subject of this litigation ...." (Pet. App. p. 50a)

Injunctive relief against the individual troopers, therefore, was found by the District Court to be inappropriate (Pet. App. p. 50a). However, for the first time in the litigation, the court injected the issue of damages by awarding damages against three troopers (Pet. App. p. 125a to 127a).

On appeal, the Court of Appeals for the Third Circuit found "adequate and reasonable support" for the District Court's factual determinations (Pet. App. p. 21a). Accordingly, it concluded:

> "The district court's findings of random acts on the part of a minority of Troopers, as well as its findings of 'no deliberate pattern and practice' on the part of New Jersey officials, bring this case wholly within the doctrine of *Rizzo [v. Goode,* 423 U.S. 362 (1976)] for the purposes of determining the propriety of injunctive relief. When we consider these findings, together with the circumstance that none of the charged and proved violations occurred under the regimes of the present responsible New Jersey authorities, it is evident that the district court was correct in denying injunctive relief ...." (Pet. App. pp. 23a to 24a).

However, the Court of Appeals reversed the District Court's award of damages made "after the case was, for all intents and purposes, at a close . . . ." (Pet. App. p. 29a). Such damages were inappropriate, the Court of Appeals determined, because "no damages had ever been contemplated by the parties" (Pet. App. p. 29a), and because had such damages been contemplated "appropriate pleadings and proceedings, including discovery, would have been utilized" and "a jury demand would probably have been made" (Pet. App. pp. 30a to 31a). It is from these factual findings and conclusions that plaintiffs now petition for writ of *certiorari.*

ARGUMENT

The Court should deny the Petition for Writ of Certiorari because the District Court and the Court of Appeals correctly concluded that Federal Equitable Relief is not warranted under 42 U.S.C. §1983 against the responsible state officials where the sole proof of alleged police misconduct consists, at the most, of 34 separate incidents occurring over a period of three years, the last of which occurred over five years ago at a time when the present responsible state officials were not yet in office, and where the Trial Court factually determined, and the Court of Appeals agreed, that there was no deliberate pattern and practice of unconstitutional police activity.

The sole issue before the District Court and the Court of Appeals in this case was whether the facts produced by plaintiffs warranted, under the doctrine of *Rizzo v. Goode*, 423 U.S. 362 (1976), federal injunctive relief against the New Jersey State Police, in particular against the Attorney General of New Jersey and the Superintendent of the State Police. Plaintiffs paraded before the trial court approximately 60 witnesses of various appearances during 28 days of trial testifying to some 66 alleged incidents of illegal searches and seizures. The incidents occurred during a three year span of time from 1969 to 1972, the last of which occurred five years ago in April 1972. The District Court, however, found that the evidence produced by plaintiffs did not demonstrate a deliberate pattern and practice of unconstitutional police conduct and accepted the responsible State officials categorical denial of such pattern and practice. These factual findings by the District Court, concurred in by the Court of Appeals, formed the basis of the conclusion that federal injunctive relief was not warranted.

Plaintiffs have not argued, much less demonstrated, that the factual findings made by the District Court and concurred in by the Court of Appeals were obviously erroneous. Thus, the petition for writ of *certiorari*, which primarily seeks to have this Court review the factual record below, fails to state any meritorious grounds for such review. *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967). That the District Court and the Court of Appeals properly denied injunctive relief on the basis of the record in this case is clear.

In *Rizzo v. Goode*, plaintiffs alleged a pattern and practice of misconduct by police officers directed against minority citizens in particular and against all Philadelphia residents in general which violated the Fourth Amendment. The responsible city officials, the Mayor, the City Managing Director and the Police Commissioner, were charged with express authorization and encouragement of the alleged mistreatment and with failure to act in a manner so as to assure that it would not recur in the future. The sole relief sought was equitable in nature, consisting of a mandatory injunction imposing a remedial program upon the City Police Department. During 21 days of trial, 250 witnesses testified with respect to approximately 40 alleged incidents of misconduct. Approximately 20 of the incidents were found to involve illegal activity on the part of the police officers.

That activity was found by the District Court (see 357 F. Supp. 1289, 1292-1316) to include not only illegal arrests but also violent, unwarranted assaults by the City police with blackjacks and nightsticks, resulting in serious injuries being inflicted upon members of the public. The police officers were also found to have made such derogatory and provocative comments as "[h]ighway patrolmen are known to be rough and tough, and I am a highway patrolman, and I am proud of it" following a severe head beating given by the patrolman who made the statement,

and such racial slurs as "[g]ot you now nigger" as well as referring to citizens as "black pigs" and "Jew bastards." The District Court also found the existing procedures for handling civilian complaints and for enforcement of police discipline to be "totally inadequate." The policy of the police department, the District Court found, was to discourage the filing of complaints, to avoid or minimize the consequences of proven misconduct and to resist disclosure of the disposition of such complaints. Nonetheless the District Court in *Rizzo* did not find any evidence of an overall policy on the part of the responsible officials to violate the constitutional rights of citizens, but did find that unconstitutional activity occurred with such frequency that it could not be dismissed as rare or isolated (357 F. Supp. at 1319).

Despite these findings, this Court determined that imposition of §1983 liability justifying federal injunctive relief was not warranted. Rather, nothing less than proof of deliberate and pervasive patterns and practices on the part of the responsible state officials was required.

The District Court and the Court of Appeals properly found, the facts in this case similarly do not demonstrate §1983 liability. As in *Rizzo*, while the District Court found several instances of illegal activity on the part of individual police officers, it found no pattern and practice of such misconduct and no policy on the part of the responsible officials to foster such misconduct. As in *Rizzo*, plaintiffs' case was based primarily upon an attempt to demonstrate a large number of instances of misconduct without demonstrating any causal relationship between those instances and the responsible officials. Indeed, the evidence in *Rizzo* of the violent unwarranted assaults upon citizens and numerous derogatory, provocative racial slurs was, if anything, far more serious than the 34 instances here of what were generally technical violations of the Fourth Amendment proscription against unreasonable searches. Only three of these instances were found by the District Court to warrant an award of damages (Pet. App. pp. 121a to 124a).* And, unlike this case, the Police Department of the City of Philadelphia was found by the District Court to foster a policy of discouraging citizen complaints and minimizing or avoiding altogether the consequences of proven misconduct.

Surely, if federal injunctive relief was found inappropriate in *Rizzo*, *a fortiori*, it is inappropriate here. Thus, while the opinion of the Court of Appeals, authored by a member of the Court reversed in *Rizzo*, unquestionably reflects some sympathy for plaintiffs and rejects anything other than a narrow reading of *Rizzo* (Pet. App. p. 13a), it nonetheless finds the specific facts of this case controlled thereby.

In light of the District Court's determination, and the Court of Appeals' concurrence, that plaintiffs did not prove a deliberate pattern and practice of police misconduct and that the categorical denial by the responsible State officials of fostering such a pattern and practice was supported by the record, plaintiffs' petition for writ of *certiorari* is clearly specious. It completely ignores these factual findings and fails utterly to demonstrate that such findings are clearly erroneous, much less even questionable. Indeed, the petition is totally devoid of any mention at all of these findings. Rather, it improperly focuses upon allegations plaintiffs sought, but failed, to demonstrate below, and recites those allegations as if actually found as facts by the District Court. The entire petition is permeated with assertions that there was "sufficient credible evidence" of a deliberate pattern and practice of misconduct without any discussion or recognition of the findings by the District Court. For instance, in their Statement of the Case, plaintiffs assert:

---

* The insubstantial amounts of those damages, $100, $150, $250 respectively, plainly reflects the District Court's assessment of the seriousness of the constitutional violations involved.

> ". . . The supervisory officials failed and refused to control the lawless behavior of the troopers, refused to discipline troopers whose lawless acts pursuant to this pattern and practice were specifically called to their attention, and instead encouraged such acts by rewarding troopers whose unconstitutional acts resulted in discovery of marijuna or narcotics." (Pet. App. p. 7).

Not only did the District Court not make such findings, but the findings it did make are clearly to the contrary.

Notwithstanding plaintiffs' efforts to fashion factual findings to their liking, quite simply they failed in this case to demonstrate direct participation by the responsible State officials in the alleged misconduct, and they failed to demonstrate anything even approaching a pervasive and deliberate pattern and practice of conducting illegal searches and seizures of "long-haired travelers."

Furthermore, even if they had demonstrated causal responsibility on the part of the then responsible officials, Attorney General Kugler and Superintendent Kelly, for a pervasive, deliberate pattern and practice of unconstitutional police conduct, clearly it would be inappropriate for the federal court to exercise its extraordinary equitable power against the present Attorney General and Superintendent. As this Court has recently observed:

> "Where there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of facts indicating that the new officer will continue the practice of his predecessor." *Mayor v. Educational Equality League*, 415 U.S. 605, 94 S. Ct. 1323, 39 L.Ed.2d 630, 645-646 (1974).

In urging that this case nonetheless presents an important question of federal law which needs to be settled by this Court, the petition for writ of *certiorari* suggests a conflict between the Court of Appeals' decision in this case reversing the award of damages and the Court of Appeals' decision in *Crane v. American Standard, Inc.*, 490 F.2d 332 (2nd Cir. 1973) authorizing an award of damages. The short answer to this contention is that no conflict exists as the Court of Appeals perceived. The decision in *Crane* rests upon wholly distinct facts. That case involved federal securities law and was based primarily upon the court's determination that no right to a jury trial on the damage issue arose in the context. Further the court clearly recognized that the possibility of damages in that suit had been contemplated throughout much of the proceedings by all parties, including the courts involved. 490 F.2d at p. 340, footnote 11. Here, the Court of Appeals correctly determined that the issue of damages had not been injected into the case until it was at a close. It further properly determined that defendants were substantially prejudiced thereby, because they would have had a right to a jury trial on the issue of damages which right they probably would have asserted. These determinations by the Court of Appeals are not only clearly correct, but they have not been challenged by plaintiffs.

But beyond this, the determination concerning damages reached by the Court of Appeals in this case and in *Crane*, are purely factual in nature and are different only because the facts in each case are different. Thus, the important question of federal law asserted by appellants is not one of inconsistent decisions concerning issues of statutory construction or constitutional law affecting broad, fundamental legal principles. Rather, they suggest that this Court's review is essential based on nothing more than different decisions in cases with factually distinct records

which, not surprisingly, have resulted in the distinct decisions. Clearly, a writ of *certiorari* to review this type of "conflict" is not warranted.

In any event, plaintiffs have never been the slightest bit interested in an award of damages in this case. If they had, they would have brought separate §1983 actions against the individual Troopers. Their only interest is in convincing this Court to reconsider *Rizzo v. Goode* because they think it incorrectly decided. Since there exists no compelling reason for such reconsideration and since clearly there is no reason for this Court to review the issue of damages, the petition for writ of *certiorari* should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondents

STEPHEN SKILLMAN
Assistant Attorney General
Of Counsel

ERMINIE L. CONLEY
Deputy Attorney General
On the Brief